

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Part 22 of the Commission's)	WT Docket No. 03-103
Rules To Benefit the Consumers of Air-Ground)	
Telecommunications Services)	
)	
Biennial Regulatory Review – Amendment of)	
Parts 1, 22 and 90 of the Commission's Rules)	

**JOINT COMMENTS
OF EMERGENCY RADIO SERVICE INC., SAIA COMMUNICATIONS, INC. KTI,
INC. AND TEXAS LICENSE CONSULTANTS**

Emergency Radio Service Inc., Saia Communications, Inc., KTI, Inc. and Texas License Consultants ("Joint Commenters"), by their attorneys and pursuant to the provisions of Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission") and the invitation extended by the FCC in the *Notice of Proposed Rulemaking* ("NPRM") in the above-referenced proceeding, hereby submit their comments responsive to the FCC's proposal to modify certain rules that govern spectrum designated for use in the public land mobile service ("PLMS").^{1/} As discussed below, the Joint Commenters support the FCC's proposals to eliminate certain restrictions on the operation of frequencies designated for PLMS operations.

^{1/} *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services Biennial Regulatory Review - Amendment of Parts 1, 22 and 90 of the Commission's Rules, Notice of Proposed Rule Making*, FCC Docket No. 03-103, 18 FCC Rcd. 8380 (Released April 28, 2003).

I. Introduction

The Joint Commenters were each high bidders for spectrum made available for geographic area licensing in Auctions 40 and 48. Each of the Joint Commenters already provides dispatch communications services in various areas of the country, and expects to employ the PLMS spectrum for which it was the high bidder to provide additional dispatch services. Two of the Joint Commenters, who were high bidders for spectrum in Auction 40, sought waiver of rule sections 22.7 and 22.577 to allow them to offer dispatch service on an unrestricted basis.^{2/} The FCC granted those applications with the associated waiver request. Each of the Joint Commenters sought similar waiver of the FCC's rules with respect to the spectrum for which they were the high bidder in Auction 48.^{3/}

As described more fully below, the basis of the Joint Commenters' waiver requests highlight the need for modification of the FCC's rules to reflect a more competitive environment for wireless communications services than existed when the rules were initially adopted. In order to clarify the ability of all licensees of spectrum designated as available for PLMS operations to provide a broader range of communications services, the FCC should adopt the rule modifications proposed in the NPRM. The Joint Commenters are, therefore, pleased to have this opportunity to submit the following comments.

II. General Eligibility: Rule Section 22.7 Should be Amended to Eliminate the Common Carrier Restriction

^{2/} Saia Communications, Inc. and Jeff Scott Cofsky d/b/a Texas License Consultants participated in Auction 40 and submitted the above referenced waiver requests. All four of the Joint Commenters have applications pending, with associated waiver requests, as a result of participating in Auction 48.

^{3/} The Auction 48 auction applications are still pending with the FCC.

The FCC proposes to amend Section 22.7 of the rules to eliminate the current limitation that only existing and proposed *common carriers* may obtain authorizations in the PLMS. The Joint Commenters agree with the Commission's proposal. Licensees who obtain authorizations for PLMS spectrum should be permitted to determine the type of services they intend to offer. The regulatory obligations applicable to licensees would be determined by the type of communications in which they are engaged.^{4/}

As noted in the NPRM, removing the requirement that Part 22 licensees be eligible as common carriers would bring the rules in compliance with the Congressional mandate in the 1993 Omnibus Budget Reconciliation Act ("Budget Act"), which establishes regulatory symmetry among mobile services.^{5/} In previous decisions implementing the Budget Act, the Commission interpreted and/or waived its rules to provide mobile carriers service flexibility. The Commission's stated purpose for such decisions has been to "give carriers offering substantially similar services the flexibility to compete in whatever manner they choose," while recognizing that "not all substantially similar service must have identical technical and operational rules."^{6/} In this instance, the services available under Parts 22 and 90 of the FCC's

^{4/} For example, certain licensees may be commercial mobile radio service ("CMRS") providers and would be subject to those applicable regulatory obligations specified in Part 20 of the FCC's rules. Providers of dispatch only communications, like the Joint Commenters, because they do not provide interconnected service, would not be subject to regulation under Part 20 (although as telecommunications carriers under Section 3(44) of the Communications Act 47 U.S.C. 153(44), they may be subject to other obligations, such as those covered by the FCC's Form 499-A, the Telecommunications Reporting Worksheet). Entities using the spectrum for internal communications requirements would be subject to none of these obligations.

^{5/} 25 Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

^{6/} *In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Second Report and Order, 12 FCC Rcd 2732, ¶ 3 (1997).

rules are substantially similar. Cellular carriers now provide “push to talk,” or dispatch services.^{7/} Similarly, Nextel Communications, Inc., licensed under Part 90 of the FCC’s rules, provides services that are competitive with those provided by Part 22 regulated cellular carriers. Therefore, consistent with the Budget Act and the FCC’s previous decisions, the FCC should adopt the proposed rule changes to allow competitors and potential competitors the flexibility to compete.

Recent FCC spectrum allocation decisions also demonstrate that the current agency policy is to permit new applicants (especially in auctioned services) to self-select the type of services they will offer and accept whatever regulatory scheme is thereafter applicable. For example, in the FCC’s decision that adopted service and technical rules for the 24 GHz frequency band, the agency adopted regulations that permit applicants to self-select their regulatory status without significant limitation, and even change their regulatory status without prior FCC approval.^{8/}

Finally, by removing the common carrier restriction contained in Section 22.7, the Commission will permit spectrum to be used for not only a broader array of carrier services, but also for internal communications purposes. New York State Electric and Gas Corporation (“NYSEG”) was a successful participant in Auction 48. NYSEG provides energy services to

^{7/} See Arik Hesseldah, *The Push-to-Talk Push*, www.Forbes.com, Aug. 18, 2003; see also *Verizon Rolling out ‘Push to Talk,’* The Business Journal Tampa Bay, www.bizjournals.com, Aug. 14, 2003. Cellular carriers provide this service pursuant to a 1995 decision permitting the provision of dispatch service on cellular spectrum. *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, Report and Order*, 10 FCC Rcd 6280 (1995) (“*Common Carrier Dispatch Order*”), recon. denied, 12 FCC Rcd 9962 (1997).

^{8/} *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules To License Fixed Services at 24 GHz, Report and Order*, 15 FCC Rcd 16934, ¶¶ 25-29 (2000).

New York State. It is unlikely that NYSEG plans to offer common carrier services to the public. Instead, it is likely that NYSEG will use its Auction 48 paging channels for private, internal operations. Removing the common carrier restriction in rule section 22.7 would allow NYSEG to operate in this manner without seeking a waiver from the FCC.

III. Rule Section 22.577: Restrictions on Dispatch Services

The Joint Commenters urge the Commission to remove the restrictions found in rule section 22.577 on the provisions of dispatch services. The restrictions include limits on output power and the functionality of the dispatch transmitter.^{9/} The Joint Commenters agree that the section 22.577 restrictions do not conform to the Commission's move to allow more flexible spectrum use. The limitations contained in section 22.577 were developed in an era when cellular companies and other common carriers were prohibited from providing dispatch services and now only serve to hamper the Joint Commenters' participation in the mobile service market.

The provisions of Section 22.577 contain several restrictions not otherwise applicable to Part 90 dispatch licensees. For instance, dispatch service providers are not permitted to operate at an output power greater than 10 watts.^{10/} To offer competitive service in the Houston, Texas market (Texas License Consultants' service area), or the Buffalo, New York market (Saia Communications' service area), for instance, dispatch service providers need the flexibility to offer greater than 10 watts output power to customers. No such limitation exists for providers of dispatch services authorized under Part 90 of the FCC's rules. The remainder of the limitations of Section 22.577 are also not consistent with the FCC's regulation of competitive providers of dispatch services. Therefore, Section 22.577 should be eliminated. Permitting Part 22 licensees to offer unrestricted dispatch services will expand the choices to wireless end users. Therefore, the

^{9/} 47 C.F.R. 22.577(a)(2-3) (2002).

Joint Commenters strongly urge the Commission to remove the restrictions found in rule section 22.577 and permit dispatch service providers to offer service unrestricted by outdated rules.

IV. Conclusion

Sections 22.7 and 22.577 of the FCC rules were created in response to market conditions that no longer exist. Moreover, the Commission in its rulemaking proceedings has moved toward creating regulatory symmetry among comparable services. By removing the restriction that only common carriers provide services under Part 22, the FCC will be following other decisions in which it has interpreted or waived its rules to provide mobile carriers flexibility. Finally, permitting unrestricted dispatch service, by eliminating rule section 22.577, will also give service providers the flexibility to meet the demands of the changing marketplace. Consequently, it is in the public interest to eliminate the restrictions of rule sections 22.7 and 22.577.

Respectfully submitted,

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^{10/} 47 C.F.R. 2.577(3) (2002).

Dated: September 23, 2003